ORIGINAL

Supreme Court, U.S.
FILED
JAN 15 1998
CLERK

No. 97-993
97-7351

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF FLORIDA,

Petitioner,

vs.

RONALD SMITH,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

BENJAMIN S. WAXMAN, ESQUIRE
Specially Appointed Public Defender
Counsel of Record for Petitioner Ronald Smith
ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A.
2250 Southwest Third Avenue, Fourth Floor
Miami, Florida 33129
(305) 858-9550

I. CERTIORARI SHOULD BE DENIED WHERE THIS CASE FAILS TO SQUARELY RAISE THE QUESTION RESERVED IN *MARSH V. RICHARDSON*, 481 U.S. 200 (1987), CURRENTLY BEFORE THIS COURT IN *GRAY V. MARYLAND*, NO. 96-8653, AND DOES NOT OTHERWISE FALL WITHIN THIS COURT'S CERTIORARI JURISDICTION.

The Florida Supreme Court reversed Mr. Smith's sentence based on two separate grounds. First, it concluded that the confessions of codefendants Austin and Bryant, which were redacted by eliminating references specifically identifying Smith, "were not sufficiently redacted because the[y] . . . contained statements which facially and powerfully incriminated . . . Smith." ***Smith v. State***, 699 So.2d 629, 643 (Fla. 1997). Accordingly, the court concluded that these confessions of non-testifying co-defendants should not have been admitted at Smith's joint trial. As a second and independent ground, the court concluded that the trial court had erred in overruling Mr. Smith's objection to the prosecutor's closing argument which urged that Bryant's confession "was evidence that *all three defendants* [Bryant, Austin, and Smith] had committed premeditated murder." *Id.* The court stated:

> Even if the confessions are found to be sufficiently redacted to be admitted with a proper instruction, an additional issue arises: whether the prosecutor in argument nullified the effectiveness of the instruction by advocating to the jury that it used the confessions against Smith.

Id. Over Mr. Smith's continuing objection, the prosecutor, in his guilt phase closing argument, continued to argue Bryant's confession as evidence against not only him, but Smith also. *Id.* at 645. Accordingly, the court concluded "that this prosecutorial misconduct requires a reversal of the penalty phase on the first-degree murder conviction." *Id.* Because the Florida Supreme Court's decision in ***Smith*** is fully supported by this finding of prosecutorial misconduct, review of this case would be improvident.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (954) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

Even were the decision below based entirely upon the improper admission of non-testifying codefendants Austin's and Bryant's confessions at Smith's joint trial, review would be unwarranted. In ***Bruton v. United States***, 391 U.S. 123 (1968), this Court considered the effectiveness of a jury instruction in protecting a defendant's sixth amendment right to confrontation in joint trials in which a confessing codefendant is unavailable and that codefendant's unredacted, powerfully incriminating, extrajudicial confession expressly implicating the defendant is introduced as evidence only against the declarant. *Id.* at 126. This Court held that, because of the substantial risk that the jury would disregard the instructions to consider the confession only against the confessing codefendant and would use it in determining the defendant's guilt, admission of the codefendant's confession violated the defendant's confrontation rights. *Id.* This Court's ruling remains a bedrock of criminal procedural jurisprudence.

In ***Richardson v. Marsh***, 481 U.S. 200 (1987), this Court considered whether the jury would be able to follow a jury instruction to consider a codefendant's confession only against the codefendant where the confession did not incriminate the defendant on its face but only did so when linked with other evidence introduced at trial. The Court held "that the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211 (footnote omitted). Explaining its reasoning, this Court distinguished the scenario addressed in ***Bruton***:

> In ***Bruton***, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." By contrast, in this case, the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR , 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (954) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

testimony).

Id. at 208 (citations omitted). This Court reserved the question whether "a confession in which the defendant's name has been replaced with a symbol or neutral pronoun" would be admissible. *Id.* at n. 5.

As the Florida Supreme Court concluded, the offending confessions of codefendants Austin and Bryant fell squarely within the rule of ***Bruton*** because they contained "statements which facially and powerfully incriminated . . . Smith." ***Smith v. State***, 699 So.2d 629, 643 (Fla. 1997). As an example, the court quoted this excerpt from Bryant's confession:

> Q. Do you know why *they* wanted to tape the people up?
> A. Yes. *They* wanted to kill.

Id. (emphasis added). Thus, unlike the confession in ***Marsh*** that only incriminated the defendant when linked with other evidence, these confessions "expressly implicated" Smith, a member of the small group which taped up the victims. This rationale, which fully supported the Florida Supreme Court's decision, did not implicate ***Marsh***.

The state's argument in its petition appears to be more akin to one made on direct appeal. It criticizes the Florida Supreme Court's analysis that a non-testifying codefendant's redacted statement cannot be admitted at a joint trial if the statement is not inculpatory of the codefendant. Pet. at 9-10. However, this analysis, no matter how meritorious, also was not essential to the Florida Supreme Court's decision. The court's well founded finding that Bryant's reference to "they" was not self-inculpatory also criticized by the state, likewise was not essential to the court's decision. Ultimately, the Florida Supreme Court's conclusion that the codefendants' confessions "facially and powerfully incriminated . . . Smith" takes this case out of the purview of ***Marsh***.

Under the guise of its argument that the Florida Supreme Court "misapplied" the harmless

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A., ATTORNEYS AT LAW
LAWYERS PLAZA, FOURTH FLOOR , 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 856-9550 • BROWARD CO. (954) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

error standards of *Chapman v. California*, 386 U.S. 18 (1967), and *Harrington v. California*, 395 U.S. 250 (1969), the state challenges the *results* of the Florida Supreme Court's harmless error analysis. Pet. at 13-17. The court's analysis is based on the unique facts of this case and raises no federal question. S.Ct.R. 10(b).

It does not appear that the instant case will be governed by this Court's decision in *Gray* or that it would assist this Court to review it together with *Gray*. The state has not demonstrated that the decision below has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." S.Ct.R. 10(b). It has not demonstrated that the decision below "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct.R. 10(c). Accordingly, review should be denied.

CONCLUSION

For these reasons, the Respondent respectfully prays that this court deny its writ of *certiorari*.

Respectfully submitted,

ROBBINS, TUNKEY, ROSS, AMSEL,
RABEN & WAXMAN, P.A.
2250 S.W. Third Avenue, Fourth Floor
Miami, Florida 33129
(305) 858-9550

BY: Benjamin S. Waxman
BENJAMIN S. WAXMAN
Fla. Bar No. 403237